IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PUBLIX WAREHOUSE, INC., Petitioner, vs. NATIONAL LABOR RELATIONS BOARD, Respondent.	)	Docket No. 22280

BRIEF OF PETITIONER

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BRIEF OF PETITIONER

STATEMENT OF THE PLEADINGS AND FACTS UPON WHICH JURISDICTION IS BASED

1. Petitioner is a corporation organized under the laws of the State of Alaska, having its principal place of business at Anchorage, and is engaged in the public warehouse business.

2. On February 1, 1967, the regional director of the Board, Region 19, Seattle, Washington, issued a complaint against Petitioner in Case No. 19-CA-3514, alleging that Petitioner had engaged in and was engaging in unfair labor practices effecting commerce within the meaning of Section 8(a)(1), (3) and (5) of the Act, effecting commerce within the meaning of Section 2(6), and (7) of the Act. The complaint was based upon an amended charge filed January 17, 1967, by Teamsters, Chauffeurs, and Helpers Local 959, (hereinafter referred to as the Union).

3. February 11, 1967, Petitioner duly served and filed its answer to the complaint denying each and every

allegation in the complaint and asserting that the Board lacked jurisdiction over the Petitioner in this action.

4. Pursuant to notice, a hearing was held on April 4, 1967, before a Trial Examiner designated by the Board. On July 14, 1967, the Trial Examiner issued a Recommended Order in which he concluded that Petitioner had engaged in certain unfair labor practices and recommended that the Board order Petitioner to cease and desist from in any manner interfering with, restraining or coercing its employees in the exercise of their rights to self organization. He further recommended that the Board order Petitioner to bargain collectively with the Union upon request and to take certain other affirmative action.

5. On July 14, 1967, the Board issued its order transferring the case to, and continued it before the Board for decision and order.

6. On August 3, 1967, Petitioner duly served and filed with the Board, its exceptions to the recommended order of the Trial Examiner, challenging the propriety and legality of certain of the Trial Examiners findings and recommendations which were adverse to Petitioner.

7. The Decision and Order complained of herein was rendered by a three man Board and served upon Petitioner on October 9, 1967..

8. This Court has jurisdiction of this proceeding pursuant to the provisions of Section 10(f) of the National Labor Relations Act, 49 STAT. 452, 29 USC Section 151, et seq., as amended by the Labor-Management Relations Act, 1947, 61 STAT.

146, 29 USC Section 141, et seq., (hereinafter referred to as the "Act").

STATEMENT OF THE CASE

The Petitioner operates a warehouse in Anchorage, Alaska, where it receives merchandise brought to it from out of the State, unloads it and then immediately or after a period of storage reloads the merchandise in trucks for distribution in Alaska.

Superior Shippers Association, Inc., a non-profit shipper's cooperative, is Petitioner's principal customer. In 1966, Petitioner paid out for the benefit of Superior which may be characterized as an advance, the amount of $118,166.91, of which payable to employee was $81,985.46 (TR-89). The dollar volume of sales and services rendered by Petitioner during 1966 to all other companies other than Superior was $34,686.69. The interstate portion of this revenue of Petitioner amounted to only approximately two-thirds of the total revenue of under $35,000.00 (TR-90).

In May, 1966, the Teamsters, Chauffeurs, and Helpers Local 959, affiliated with the International Brotherhood of Teamsters, Chaufeurs, Warehousemen and Helpers of America, Independent, (hereinafter called "Union") began to organize Petitioner's warehouse employees and thereafter filed a petition for representation election. By consent the election was held on September 15, 1966. The Union was certified as a collective bargaining representative on September 23, 1966.

The Respondent has found that by questioning employees about their feelings toward a union, by giving a wage raise to David Schacht and by promising one to Lance Brewster in an attem to get them to oppose the Union, and by instructing Dwane Philli to work Brewster and Walter J. Barth so hard that they would qui the Petitioner has interfered with, restrained and coerced em- ployees in the exercise of rights guaranteed in Section 7 of the Act and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

The Respondent further found that by imposing a layoff on Barth in the hope that he would quit, the Petitioner has dis- criminated in regard to Barth's tenure of employment in an effor to discourage membership in and support for the Union and has thus engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

It further found that the Petitioner had cut the hours of employees in the bargaining unit from 47-1/2 to 40 hours per week to retaliate against them because of their vote for the Uni and to induce them to quit. It alleged that the Petitioner had discriminated in regard to employee's conditions of employment to discourage membership in and support for the Union and has there engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

The Respondent further found that the Petitioner had changed the work hours of employees substantially affecting thei earnings without affording the Union opportunity to bargain about this matter. Thereby the Petitioner was found to have refused to

bargain with the Statutory Representative of its employees and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

The Petitioner denies each and every finding of the Respondent.

SPECIFICATION OF ERRORS

1. The Respondent erred in taking jurisdiction over Petitioner by finding that the Respondent derives revenues exceeding $50,000.00 annually for services in connection with the receipt, storage and loading of goods in commerce and that the Respondent is thereby engaged in commerce or in an activity affecting commerce within the meaning of Section 2(6) and (7) of the Act. (R-14)

2. The Respondent erred in finding that the Respondent instituted wage and hour changes affecting employees in the appropriate union and thereby engaged in an unfair labor practice. (R-19)

3. The Respondent erred in finding that the Respondent interfered with, restrained and coerced employees in the exercise of rights and has thereby engaged in unfair practices within the meaning of Section 8(a)(1) of the Act. (R-19)

4. The Respondent erred in finding that the layoff of Walter J. Barth and the cutting of weekly earnings of the warehouse employees resulted in discrimination in regard to the tenure of employment and conditions of employment of Barth and the other employees to discourage membership in the union.

SUMMARY OF ARGUMENT

The Respondent should not take jurisdiction over the Petitioner in this matter since the only way the Petitioner can be linked to interstate commerce is through Superior Shippers Association, Inc., a non-profit cooperative consolidation organization. Under its existing tests, the Respondent would not take jurisdiction over Superior, therefore, service to Superior should not form the basis of exercise of jurisdiction over Petitioner. The dollar volume of sales and services rendered by the Petitioner to all other customers in interstate commerce was approximately $28,000.00.

The Respondent went well beyond the complaint that was filed in this matter which only alleged activities between August 8, 1966 and September 30, 1966. The charges against the Petitioner were sustained on the basis of findings involving charges well outside the period of the complaint and are, therefore, irrelevant and were prejudicial.

The statements made by management to the employees were in the nature of predictions and not threats.

The layoff of Walter J. Barth was due to a lack of work and was not discriminatory.

The cutting of the employees from 47-1/2 hours to 40 hours per week was at the employees' request and was further due to a drop off in business. There is no law that states an employer must employ workers on an overtime basis. Such a finding should not be upheld in this case.

ARGUMENT

1. The Respondent erred in taking jurisdiction over Petitioner by finding that the Respondent derives revenues exceeding $50,000.00 annually for services in connection with the receipt, storage and loading of goods in commerce and that the Respondent is thereby engaged in commerce or in an activity affecting commerce within the meaning of Section 2(6) and (7) of the Act. (R-14)

The National Labor Relations Board (Board) has stated that it will exercise jurisdiction in future and pending cases involving freight transportation companies that furnish interstate transportation services and transportation or other enterprises that function as essential links in transportation of passengers or commodities in interstate commerce, where such companies and enterprises derive at least $50,000.00 gross annual revenue from such operations, or perform services valued at $50,000.00 or more annually for enterprises for which the Board would assert jurisdiction. In applying the "essential links" part of this standard, jurisdiction is not asserted on the basis of services performed for a company that meets the Board's standards only by virtue of indirect outflow or inflow. HPO Service, Inc. 122 NLRB No. 62, 43 LRRM 1127.

The only way that Petitioner can be considered to be an essential link in interstate commerce is by its services performed for Superior Shippers Association, Inc., (Superior), a non-profit cooperative consolidation organization. Superior is owned by approximately sixty (60) members who utilize the organization as a consolidation association for pooling freight on freight cars shipped from Seattle to Alaska. Mr. Moesh is the owner of Publix, being its sole stockholder and president. He

testified that Superior has nothing to do with Publix, that he is not the general manager of Superior, that Superior is directed by its board of directors from Seattle, that he has no profit making function in Superior. (TR-74). Employees in question in this proceeding unload freight from cars at Publix Warehouse which is then distributed locally in trucks belonging to Superior. The employees are paid with Publix checks for work performed for Superior but Publix does not derive any profit on labor cost. (TR-89). Publix paid out for the benefit of Superior which may be characterized as an advance, the amount of $118,166.91, of which payroll to employees was $81,985.46. (TR-89).

The dollar volume of sales and services rendered by Publix Warehouse, Inc. during 1966 to all other companies other than Superior was $34,686.69. If all of the revenue other than Superior or Publix was interstate in nature which it is not, Publix would still not come within the jurisdictional limits as set forth in the HPO Service, Inc. case. The interstate portion of the revenue of Publix amounted to only approximately two-thirds of the total revenue of $34,686.69. (TR-90).

The Board would not exercise jurisdiction over the operations of Superior alone, if these employees were those of Superior. In the case of Midwest Pool Car Association 114 NLRB No. 110, 37 LRRM 1023, the Board stated that operations of non-profit organizations formed for purpose of having merchandise loaded on freight cars for its members and distributing it to them upon arrival do not have sufficient impact upon interstate commerce to justify assertion of jurisdiction. In collecting

freight charges from its members, the employer is merely acting as their agent and money collected does not constitute revenue to an employer. As in the Midwest case, the members of the organization of Superior include retail and wholesale establishments. Superior makes no out-of-state purchases itself, and at no time has title to the merchandise it handles for its members. Goods purchased by the individual members are delivered by the Vendors to Superior in Seattle for consolidation into carload lots and delivery to the railroad. The cars are then sent to Superior in Anchorage which is responsible for the freight charges All deliveries are made within the State of Alaska. Each member of Superior is assessed for its proportionate share of the freight charges and for expenses.

The Midwest Pool Car case is still the law of the Board, and it is obvious that Superior would not come within the jurisdiction of this Board. In that event, under the decision in HPO Service, Inc. jurisdiction would not be effected against Publix since it does not perform services valued at $50,000.00 or more annually for enterprises over which the Board would assert jurisdiction.

Counsel does not see how the matter could be any plainer There are only three ways that Petitioner can come under the Board's jurisdiction under HPO Service standards:

(a) It must be engaged in the furnishing of interstate transportation services of at least $50,000. Publix is not.

(b) It must be a transportation or other enterprise functioning as an essential link in transportation in interstate commerce with $50,000 revenue. Publix is not

(c) It must perform services valued at $50,000 or more per annum for enterprises as to which the Board would assert jurisdiction under any of its jurisdictional standards. Publix does not, because Superior would not come under the Board's jurisdiction.

The Respondent apparently bases its jurisdiction under (b), but is this not specious reasoning? The only "link" could be that of a purely local service for Superior in Anchorage. If the transportation of the freight in interstate commerce by Superior for its own members is not felt to be important enough for the Board to exercise jurisdiction, how can the service of Publix be an essential link to that commerce. The Board's reasoning is a clear case of "pulling one's self up by your own bootstraps". Or, to put it another way, the "chain" of commerce is not critical nor deserving of jurisdiction, but the "link" is! We are sure the Board has more important work to do than build jurisdiction for itself on such tenuous reasoning.

2. The Respondent erred in finding that the Respondent instituted wage and hour changes affecting employees in the appropriate union and thereby engaged in an unfair labor practice. (R-19).

It should be noted first of all that the complaint filed in this action only complains of matters that took place between August 8, 1966 and September 30, 1966. Yet the decision of the Trial Examiner dwells on facts and activities which took

place over an extensive period of time well in excess of that complained of in the complaint. These findings are irrelevant and should be disregarded by the Board.

The examination of the testimony by the various witnesses in this case shows that in only one case was any individual contract even remotely attempted to be negotiated with an employee or a wage increase offered during a period of August 8, 1966 to September 30, 1966. That was the case of Lance Brewster. In this case apparently Brewster, himself told Phillips (who was acting as a "pusher") that if he got $200.00 a week he would vote against the union. (TR-56).

3. The Respondent erred in finding that the Respondent interfered with, restrained and coerced employees in the exercise of rights and has thereby engaged in unfair practices within the meaning of Section 8(a)(1) of the Act. (R-19).

The testimony is clear that what statements were made by management were in the nature of predictions and not threats. At no time did any witness testify that Moesh or any other officer of Publix threatened them with any of the results set forth in Paragraph 6 of the complaint.

The NLRB frequently evaluates particular employer statements by distinguishing between illegal threats or promises and lawful predictions or prophesies or expressions of legal position. In the leading decision the NLRB made the following ruling:

> "A prophesy (by an employer) that unionization might ultimately lead to loss of employment is not coercive where there is no threat that the employer would use if he had any power to make its prophesy come true." Chicopee Mfg. Corp., 107 NLRB 101, 33 LRRM 1064.

There is nothing in the record whatsoever that shows

that Publix would use any economic power to make any of the prophesies that Moesh made, come true. Publix did not have the economic power to make any of such statements come true. There is not a single reference in the record to any statement that work normally within the appropriate bargaining unit would be contracted out if the employees chose the union. Rather what Moesh stated was that Publix must continue to be competitive and if it was not competitive, Superior would take its business elsewhere, i.e. to the Alaska Railroad or Sea-Land Service for distribution. Statement by employer that he might be forced out of business if he had to charge as much as the customer to do his own work has been upheld as an economic prophesy. NLRB vs. Transport Clearing, Inc., 311 F.2d 519, 52 LRRM 2034, CA 5, 1962. A further statement by the employer that under the union a company would not be able to provide continuous employment during the past year was found to be a lawful prediction. Texas Industries, Inc. vs. NLRB, 336 F.2d 128, 57 LRRM 2046, CA 5, 1966. There are many other cases in the same vein in the reports. It has also been held that coercive isolated employer statements to the effect that the plant would be closed down if the union won the election would not nullify an election. The Morganton Full Fashioned Hosiery Co., 107 NLRB 1534, 33 LRRM 1421 (1954).

The statements made by Mr. Moesh were all statements of predictions or prophesies or legal position and did not constitute an illegal threat or an illegal promise under the Act.

Under Section 8(c) of the Act, statements containing

no threats of reprisal or promises of benefit do not, in themselves, constitute interference with or restraint or coercion of employees in their right of self-organization. An employer may lawfully express his opposition to a union or to unionism in general, and he may argue against a strike or other considered activity provided he does not suggest that employees will be penalized for refusing to adopt his views. For example, derogatory remarks about unions, statements as to the evil affects of unionization, charges of union exploitation of employees, declarations as to the futility of unionization, and similar remarks are ordinary privileged as free speech. Thus, a statement was held privileged in which an employer declared that his employees would experience economic hardships should they join a union; a supervisor's declaration of anyone who joined a union was "nothing more than a cutthroat, gangster and an outlaw" has been permitted; a superintendent's isolated assertion that there would never be a union in any company in which he worked was found by the court not to be unfair practice; the NLRB itself has held a shutdown threat was not unlawful where solicitation of union membership during working hours was seriously interfering with production; abusive language in an anti-union letter, an admonition to "stay out of trouble", advising employees not to join a union, "appeals to reason", a characterization of a union as "outlaw", "wildcat", and "offbreed" - all these type statements have been held privilege. See CCH Labor Law Reports, Sections 5010-5045.

The Board is prevented by Section 8(c) from using

statements by an employer as a means of proving that he has committed unfair labor practice unless the statements themselves are coercive. CCH Labor Law Reports, Section 5020.18.

Once again, a threat must be distinguished from a mere prophesy. CCH Labor Law Reports, Section 3770. For example, statements to the effect that unionization would result in shutdowns have been held to be prophesies coming within the privilege of free speech, rather than unlawful threats constituting coercion under the Act, where the employer made it clear that the shutdowns would result from economic necessity as a result of paying union wage scales, and there was no threat that the employer would use its economic power to make the prophesy come true. The facts of this case show there should have been no finding of a violation of Section 8(a)(1) of the Act.

4. The Respondent erred in finding that the layoff of Walter J. Barth and the cutting of weekly earnings of the warehouse employees resulted in discrimination in regard to the tenure of employment and conditions of employment of Barth and the other employees to discourage membership in the union.

The Respondent cannot see any argument over the fact that the employees were receiving pay based on a 45 hour work week prior to September, 1966. During that month, hours of work were cut to 40 hours and wages were reduced accordingly. However, it is clear that the hourly rate per employee was not reduced. At the request of several of the employees, and the employer ascertaining a definite dissatisfaction with working on Saturday, the employees hours were reduced to 40 hours. There is nothing in the Wage and Hour Laws that requires an employer to provide overtime hours for its employees.

In the case of Schacht, he was receiving $230.00 in a week that he worked 47-1/2 hours. This is the equivalent of 51-1/4 hours of straight time, or $4.49 per hour. After the alleged cut in "Pay", the employee worked 40 hours for which he was paid $179.60. Clearly, this shows no wage cut, but merely a reduction in hours to a normal work week of forty hours. It is clear that the company was careful not to cut any one's wages.

The same analysis can be made for the other employee, and it will be shown that the hourly rate was $3.33 per hour. Every one of the employees confirmed that they worked 47-1/2 hours per week before the time they were cut to 40 hours. They were paid accordingly, and we fail to see how they have been prejudiced.

Respondent agrees that Barth was temporarily laid off, but only because he was not needed due to a decline in business. (TR-29).(See also Deegan's testimony at TR-94). There is no question that he was low man in seniority, and would have been laid off first under any circumstances. As soon as another man quit in about 10 days, Barth was re-hired. It would really be a stretch of the imagination to call this an unfair labor practice. Phillips worked 60 hours the week after Barth was laid off, but the extra work was on a Saturday. One customer wanted their freight in advance. (TR-86). It is our understanding that you cannot take overtime from a regular employee by calling in another employee on an overtime situation such as occurred that week. This would definitely be the subject of a grievance under the present Teamsters' contract, if Phillips had been denied the overtime.

CONCLUSION: The Board has no jurisdiction over the Respondent. Even in the event that jurisdiction is found, the Respondent has not been guilty of any unfair labor practices. The decision of the Board should be overturned.

DATED at Anchorage, Alaska, February 16, 1968.

John M. Stern, Jr.

JOHN M. STERN, JR.
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document upon all parties to the above proceeding, by mailing copies thereof to them, or their attorneys, properly addressed with postage prepaid.

DATED at Anchorage, Alaska, February 16, 1968.

John M. Stern, Jr.

JOHN M. STERN, JR.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

John M. Stern, Jr.

JOHN M. STERN, JR.